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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 631

BUILDERS CORPORATION OF AMERICA

AND

HERLONG SIERRA HOMES, INC., *Petitioners;*

v.

THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit, dated and entered August 7, 1963.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 320 F. 2d 425.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 7, 1963. The jurisdiction of of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

Was the Court below correct in holding that acts of government subordinates on the operational level, whether negligent or not, cannot be actionable if such acts are executing a policy adopted in the exercise of an immune discretion? (Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2680)).

Is the holding of the Court below that immunity arising from discretion at the policy level applies all the way down the line in conflict with *Indian Towing Co.* v. *U. S.*, 350 U.S. 15?

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2674 provides pertinently:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances * * *."

28 U.S.C. § 2680 provides pertinently:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> "(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

STATEMENT OF THE CASE

The Sierra Ordnance Depot, a military installation for the storage, shipment and destruction of explosives, is necessarily located in a desolate and isolated area of Northeast California.

Housing for the employees at the Depot was furnished by the Government. Such housing, as early as 1947, was determined to be inadequate and, as such, impeded the effective operation of the Depot.

Due to the inadequacy of housing, the Commanding Officer of the Depot, after negotiations between the Department of Defense, Federal Housing Administration (FHA), and Housing and Home Finance Agency (HHFA), pursuant to the National Housing Act of 1934 (12 U.S.C. § 1702), and the Act of August 8, 1949 (12 U.S.C. § 1748 et seq.),[1] requested construction of some 456 dwelling units to house civilian and military personnel employed at the Depot. This request was approved by the Commanding General, Sixth Army, the Superior of the Depot Commanding Officer, and by FHA.

The Department of Defense on October 24, 1951, certified to FHA that 125 units were necessary to provide adequate rental housing for the civilian and military personnel at the Depot. Immediately thereafter, the Depot Commanding Officer renewed his request for an additional 300 units which was denied by reason of prior policy precluding a supplemental certification until the initial project is 25% or more completed. Early in 1952, however, following designation of the

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[1] These statutes require that private enterprise undertake the construction, rental and operation of such housing.

Depot as a critical defense housing area, the construction of an additional 150 dwelling units was authorized.

Pursuant to statutory authority, FHA agreed to insure a mortgage on the 125 units certified on October 24, 1951, in the amount of $1,113,700, and petitioner, Herlong Sierra Homes, Inc. (Herlong), filed application, received approval, and undertook the construction of said units, having obtained a loan in said sum secured by a mortgage on the dwelling units and the personal property and fixtures therein. These units, authorized under Title VIII of the National Housing Act (the "Wherry Act"), were ready for occupancy in late 1953 in accordance with specifications issued and approved by the Department of the Army and FHA, which agencies were to also establish rent charges for the units. The monthly cost to Herlong to carry this project was about $9,000.

Petitioner, Builders Corporation of America (Builders), in accordance with specifications issued and approved by the Department of the Army and FHA, undertook construction of the 150 units authorized in 1952 pursuant to a commitment from FHA to insure a mortgage of $1,261,300 on said units. The mortgage on such units, built under authority of Title IX of the National Housing Act, was purchased by Federal National Mortgage Association. These units, commenced only after the Title VIII units were substantially completed, were ready for occupancy in July 1954. The monthly cost to Builders to carry this project was about $8,000.

In order for the units constructed by petitioners to have met their costs, it had been determined that 91% occupancy would be required. Recognizing his re-

sponsibility under Army Regulations,[2] the Commanding General of the Sixth Army adopted a policy designed to encourage the maximum occupancy of the units; in implementation of such policy, Commanding General, Sixth Army, directed his subordinate, Commanding Officer of the Depot, to take certain specified action to insure the requisite occupany.[3]

Petitioners contended below that the Commanding Officer's negligence in carrying out such directives resulted in continued vacancies in the Title VIII units thus causing Herlong to default in its mortgage payments and a foreclosure ensued. Few of the Title IX units were ever occupied, resulting in 1955 in a notice of default, sale and acquisition of the units by the United States.

ARGUMENT

Essentially, the appellate court held that if governmental action be predicated on discretion, the United States is immune from liability both at the decision level and thereafter on the operational level for the acts, negligent or not, of its subordinate officials charged with the task of carrying out the decision.

This interpretation of the "discretionary function exception" to the Federal Tort Claims Act is entirely

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[2] Paragraph 11b of AR 210-220 states in part that ". . . the Army, in initially certifying to the FHA the need for this housing, has assumed a definite moral obligation and has keen self-interest in all housing projects to assure that all units are occupied within the allowed occupancy factor for the individual projects. Accordingly, it will be the direct responsibility of the installation commander to provide the mortgagor with a coordinated and aggressive program to assure maximum occupancy."

[3] Appendix B, C and D.

at odds with the construction placed thereon by this Court. Beginning with the dissent in *Dalehite* v. *U. S.*, 346 U.S. 15, 47 (1953), and subsequently through the majority opinion in *Indian Towing Co.* v. *U.S.* 350 U.S. 61 (1955), this Court carefully carved out the limitations on the applicability of this important exception to the liability of the United States.

Congress in enacting the Tort Claims Act intended to breach the wall of sovereign immunity and provide a means of compensating the victims of negligence in the conduct of governmental activities. Recognizing this inescapable fact, the minority in *Dalehite* realized that the too literal reading of the discretionary function exception by the majority was defeating the whole purpose of the Act.

Justice Jackson, speaking for the three dissenters, cogently points out that where discretion is involved,

> "We do not predicate liability on any decision taken at 'Cabinet level' or on any other high-altitude thinking. Of course, it is not a tort for government to govern, and the decision to aid foreign agriculture by making and delivering fertilizer is no actionable wrong." 346 U.S. 57.

But the Justices quickly note that governmental immunity arising from discretion does not inexorably persist.

> "The common sense of this matter is that a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail. We cannot agree that *all the way down the line* there is immunity for every balancing of care against cost, of safety against production, of warning against silence." 346 U.S. 58. Emphasis added.

The philosophy of the minority in *Dalehite* was espoused by the majority in *Indian Towing Co.* v. *U. S.* The Court recognized that the discretionary function exception while protecting the United States in the formulation of policy may fail the Government on the operational level through the carelessness or negligence of its employees in executing orders implementing policy. The Court said:

> "The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." 350 U.S. 69.

Erroneously relying on the principle of immunity "all the way down the line" the Court below held that the facts of this case could not impose liability on the government.

As in the "Coast Guard" situation above, the Commanding General Sixth Army was exercising discretion in adopting a policy to ensure the occupancy of petitioners' units. However, once the Commanding General exercised his discretion to direct his subordinate in charge of detail, such subordinate was obligated to use due care in the carrying out of his su-

perior's directives.[4] Petitioners contend that the Depot Commanding Officer failed therein, thereby causing damage to them, giving rise to liability on the part of the United States under the Federal Tort Claims Act.

In reaching its holding that immunity arising from exercise of the discretionary function protects the government at all levels of activity, decision-making and operational, the Court of Appeals relied exclusively on *Dalehite*, and ignored the subsequent decision of this court in *Indian Towing Co.* The latter case evolved as the applicable law the position of the minority in *Dalehite*, namely, that liability *can* arise for the negligent performance on the operational level of directives which proceed from the exercise of immune discretion at a higher level. In fact, in *Indian Towing Co.*, this court notes that the government "does not deny that the Federal Tort Claims Act does provide for liability in some situations on the 'operational level' of its activity". 350 U.S. 64.

The purported recitation by the Court of Appeals of "the applicable law" that the Federal Tort Claims Act "did not create new causes of action where none existed before, nor did it foist novel and unprecedented liabilities upon the federal government," was specifically rejected by this Court in *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957):

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[4] It has been maintained by petitioners throughout this litigation that each of the three "directives", dated January 23, 1954, April 28, 1954, and July 10, 1954, respectively, were "orders". The District Court classified only the July 10, 1954, "directive" as an "order". The Court of Appeals, in view of its disposition of the case, did not reach the question of whether any of the "directives" were "orders". These "directives" are set out in full as Appendix B, C and D hereto.

> "It may be that it is 'novel and unprecedented' to hold the United States accountable for the negligence of its firefighters, but the very purpose of the Tort Claims Act was to waive the Government's traditional all-encompassing immunity from tort actions and to establish novel and unprecedented governmental liability."

Likewise erroneous under decisions of this Court was the characterization of "the applicable law" by the court below that "Acts of a governmental nature were never intended to be within the scope of the liability created." There *can* be "recovery based on the negligent performance of the activity itself, the so-called 'end objective' of the particular governmental activity." (*Indian Towing Co.*, p. 66). "[A]ll Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." (*Indian Towing Co.*, p. 67).

> "[I]t is hard to think of any governmental activity on the 'operational level', our present concern, which is 'uniquely governmental', in the sense that its kind has not at one time or another been, or could not conceivably be, privately performed.
>
> "* * * The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import

immunity back into a statute designed to limit it." *Indian Towing Co.*, pp. 68-69.

> "The over-all impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the "operational level".' It seems broad enough to cover all so-called 'uniquely governmental activities'." *Indian Towing Co.*, p. 76. (Dissenting Opinion.)

In ignoring the dictates of *Indian Towing Co.*, the Court of Appeals' decision adheres to the rejected rule that the immunity arising from the discretionary functions protects the government all the way down the line. Thus the Court below finds that whether or not the Depot Commanding Officer, the officer on the operational level, was negligent in following orders carrying out the policy of his superior is immaterial. In so holding, the court below erred. Petitioners are entitled to have a judicial inquiry by the Court of Appeals into the question of whether the governmental activity on the operational level was or was not negligently performed.

In the interests of the administration of justice, it is incumbent upon this Court to correct the mistaken impression left by the decision below to the effect that immunity growing out of discretion never ends. The Federal Courts are entitled to know when and under what circumstances discretion ends and liability begins.

CONCLUSION

The action of the Court of Appeals in barring petitioners' claims by virtue of the "discretionary function or duty" exception to the Federal Tort Claims Act was erroneous. For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

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